

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION II

CA06-921

March 21, 2007

SOUTHERN TELEPHONE CONST.
CO., INC., LEGION INSURANCE CO.,
SECOND INJURY FUND and DEATH
& PERMANENT TOTAL DISABILITY
FUND

APPELLANTS

V.

APPEAL FROM THE WORKERS'
COMPENSATION COMMISSION
[NO. E814677]

GRATTON HARRIS

APPELLEE

AFFIRMED

Appellant Southern Telephone Construction Company appeals the Workers' Compensation Commission's decision awarding benefits to appellee Gratton Harris. Southern Telephone argues that the Commission's decision was not supported by substantial evidence. We disagree and affirm.

Harris testified at the hearing that he worked for the past twenty-seven years as an "aerial man" for different companies climbing telephone and electric-power poles. On November 20, 1998, while working for Southern Telephone, Harris was climbing down a pole and fell fifteen to thirty feet, striking his back on the rim of a fifty-five gallon barrel. Southern Telephone accepted this accident as compensable and paid medical and indemnity benefits until March 10, 2000.

As a result of the fall, Harris immediately experienced back pain; however, he was asked to return to work, which he did for about three hours until his superintendent allowed him to go home. The next morning, Harris's back was black; over the weekend, his back pain increased causing him to seek medical treatment at the emergency room. Harris was treated by general practitioner Dr. Garreth Carrick, who continued to treat Harris conservatively. Harris was also treated by Dr. Thomas Cheyne, an orthopedic surgeon, who ordered an MRI, which showed canal stenosis at the L4-L5 level. Eventually, Dr. Carrick referred Harris to Dr. Joseph Queeney, a neurosurgeon.

Harris's first visit with Dr. Queeney was on September 27, 1999. Dr. Queeney noted the L4-L5 bulge on the MRI; stated that he did not see any evidence of nerve-root compression; noted that the canal stenosis was minimal and surgically insignificant; stated that he felt the exam was nonphysiologic; and noted that Harris was exhibiting signs of symptom-magnification. Dr. Queeney concluded by stating that he did not have anything further to offer Harris and diagnosed a lumbar contusion.

On November 16, 1999, Harris had a functional-capacity evaluation. The evaluator concluded that Harris could work at a sedentary level and that he passed only seventeen of forty validity criteria, which suggested very poor effort or voluntary-submaximal effort not related to pain, impairment, or disability.

Dr. Queeney saw Harris again on January 3, 2000. He re-reviewed all diagnostic testing performed to date, which included the FCE, and stated that he found nothing to

support Harris's complaints of pain. Dr. Queeney concluded that he was unable to find any pathological entity and did not recommend surgery or any further treatment. He issued a zero-percent impairment rating and advised Harris he could seek a second opinion from an anesthesia-pain specialist or another neurosurgeon.

Harris was seen by a pain specialist, Dr. John Swicegood, for epidural-steroid injections in February of 2000, which were of no benefit. In April 2000, Dr. Swicegood opined that Harris would benefit from a consult with a second neurosurgeon and recommended a nerve-conduction study and myelogram. Dr. Swicegood stated that Harris had some degenerative changes that could account for his pain. Dr. Swicegood could not state with any certainty whether the degenerative changes were work related. He reserved reaching a final conclusion until reviewing the results of the additional testing he recommended. In May 2000, Dr. Carrick stated that he agreed with Dr. Swicegood's recommendations.

On March 10, 2000, Southern Telephone stopped Harris's workers'-compensation benefits and controverted the request for a second neurosurgical opinion. In response, Harris filed a claim requesting additional medical treatment, including a second neurosurgical evaluation by Dr. Anthony Capocelli. On October 24, 2000, the ALJ found that Harris failed to meet his burden of proving an entitlement to additional medical treatment after March 10, 2000. In January 2001, Harris, on his own, sought treatment from Dr. Capocelli. EMG/NCV testing was performed on February 1, 2001, which was essentially normal, but a lumbar

myelogram on March 21, 2001, showed a probable disk protrusion at L4-L5 with possible bulges at L3-L4 and L5-S1. On April 24, 2001, Dr. Capocelli recommended surgery, which Southern Telephone controverted.

Harris then filed a motion with the Commission requesting that his case be remanded to the ALJ for consideration of new evidence, including the reports of Dr. Capocelli and Dr. Swicegood. On July 19, 2001, the Commission granted Harris's motion. In January 2001, the ALJ found that Harris was entitled to additional medical treatment, subsequent to March 10, 2000, and also named Dr. Capocelli as Harris's authorized treating physician. Southern Telephone appealed the ALJ's decision, which was affirmed by the Commission on September 26, 2002. Southern Telephone did not appeal the Commission's decision.

Harris continued treating with Dr. Capocelli, and an MRI performed July 24, 2002, showed moderate central-disc protrusion at L4-L5 with narrowing of the subarachnoid space and left lateral protruding component. On August 13, 2002, Dr. Capocelli recommended surgery again, which Southern Telephone again controverted.

A hearing on this issue was delayed because Southern Telephone's workers' compensation carrier went into receivership, involving the Arkansas Guaranty Fund. Over a year later, on December 11, 2003, Dr. Capocelli noted that Harris had not had surgery, but continued with complaints. Dr. Capocelli then recommended a discogram, which was performed January 30, 2004. On April 22, 2004, Dr. Capocelli reported that the discogram was normal and stated that he no longer recommended surgery. He further opined that Harris

did suffer a work injury, but with the delay of six years, he reached maximum-medical improvement without surgery. Dr. Capocelli expected Harris's impairment rating to be seven percent, and he recommended another FCE.

Harris filed another claim seeking: (1) additional temporary total disability benefits beginning March 10, 2000, continuing through a date yet to be determined; (2) additional medical treatment subsequent to March 1, 2004, including the recommended FCE recommended by Dr. Capocelli; and (3) mileage reimbursement. A second hearing was held and, on June 17, 2005, the ALJ found in favor of Harris on all three issues. Southern Telephone appealed, and the Commission affirmed and adopted the ALJ's opinion. On appeal, Southern Telephone contends that substantial evidence does not support the Commission's decision.

On appeal, in workers'-compensation cases, we view the evidence and all reasonable inferences deducible therefrom in the light most favorable to the Commission's findings and affirm if those findings are supported by substantial evidence. *K II Constr. Co. v. Crabtree*, 78 Ark. App. 222, 79 S.W.3d 414 (2002). Substantial evidence is relevant evidence that reasonable minds might accept as adequate to support a conclusion. *Id.* If reasonable minds could reach the conclusion of the Commission, its decision must be affirmed. *Id.* We cannot undertake a de novo review of the evidence and are limited by the standard of review in workers'-compensation cases. *Id.*

We first address Southern Telephone's argument that there is a lack of substantial evidence supporting the Commission's decision that Harris was entitled to additional medical treatment subsequent to March 1, 2004. The issue of whether medical treatment is reasonable and necessary is a question of fact for the Commission to decide and, therefore, the issue naturally turns on the sufficiency of the evidence. *Gansky v. Hi-Tech Eng'g*, 325 Ark. 163, 924 S.W.2d 790 (1996).

Southern Telephone argues that Dr. Capocelli, in April 2004, opined that Harris reached maximum-medical improvement and was entitled to a seven-percent impairment rating, which is clear evidence that Harris had reached the end of his healing period and was not in need of further medical treatment. Southern Telephone further contends that the FCE recommended by Dr. Capocelli was for the sole purpose of determining Harris's work abilities.

While Dr. Capocelli's opinion and impairment rating are relevant on the issue of whether additional medical treatment is reasonable and necessary, they are not dispositive in this case because Dr. Capocelli also recommended that Harris undergo an FCE. Dr. Capocelli, in his May 2005 deposition, recommended the FCE to not only determine Harris's work restrictions and abilities but also to determine if any other medical treatment was needed.

Our supreme court addressed this very issue in *Gansky*, where appellant's treating neurosurgeon recommended a FCE prior to making his final evaluation. The employer

controverted the FCE based on reports from another doctor and a physical therapist that appellant was nearly symptom-free, had all but recovered from his injury, and had returned to work. The ALJ held the employer liable for medical benefits, including the FCE, and the Commission reversed. The supreme court reversed the Commission, holding that because the employer refused to pay for the FCE, a final essential examination was never performed, and a final evaluation by the neurosurgeon was never made. Our supreme court stated, “[u]nder these circumstances when the treating neurosurgeon has prescribed a functional capacity assessment and that was not done because [the employer] would not pay for it, we cannot agree with the Commission that additional medical treatment was not reasonably necessary or that the healing period had ended.” *Gansky*, 325 Ark. at 169, 924 S.W.2d at 794. The court further stated, “[i]t is clear ... [the doctor’s] opinion hinged on the results of the functional capacity assessment, which was not performed.” *Id.* at 170, 924 S.W.2d at 795.

Just as the employer in *Gansky* refused to pay for an FCE recommended by the treating physician prior to making a final evaluation, Southern Telephone controverted the FCE recommended by Harris’s treating physician, and, as a result, Harris’s medical treatment was never completed. What Dr. Capocelli might have recommended following the FCE—additional testing, physical therapy, work hardening, and/or a change to the impairment rating—will never be known because Southern Telephone refused to pay for it. Based on the foregoing, we hold that there is substantial evidence to support the

Commission's decision that Harris is entitled to additional medical treatment subsequent to March 1, 2004, including the FCE.

Southern Telephone also argues that there is a lack of substantial evidence to support the Commission's decision that Harris is entitled to temporary-total-disability benefits beginning March 10, 2000, continuing through a date yet to be determined. Southern Telephone alternatively contends that temporary-total-benefits should be discontinued as of April 22, 2004, when Dr. Capocelli stated that Harris reached maximum-medical improvement and issued the impairment rating. Based upon this evidence, according to Southern Telephone, Harris was no longer in his healing period after April 22, 2004, and, therefore, is no longer entitled to temporary-total-disability benefits. We disagree.

Temporary-total disability is that period within the healing period in which an employee suffers a total incapacity to earn wages. *K II Constr. Co., supra*. When an injured employee is totally incapacitated from earning wages and remains in his healing period, he is entitled to temporary total disability. *Id.* The healing period ends when the employee is as far restored as the permanent nature of his injury will permit and the underlying condition causing the disability has become stable and nothing in the way of treatment will improve that condition. *Id.* The question of when the healing period has ended is a factual determination for the Commission that will be affirmed if it is supported by substantial evidence. *Id.*

Our holding with regard to the issue of additional medical treatment necessarily resolves one aspect of the additional temporary-total disability issue. Because we have held

that substantial evidence supports the Commission's decision to award additional medical treatment, Harris remains in his healing period.

Furthermore, we hold that substantial evidence supports the second aspect of this issue—that Harris is also totally incapacitated from earning wages. Dr. Carrick, at the first hearing on September 25, 2000, testified that Harris had not reached maximum-medical improvement and was unable to perform his job. There is no indication that Dr. Carrick ever subsequently opined that Harris reached maximum-medical improvement or was able to return to work. In September of 2000, Dr. Swicegood likewise could not say that Harris had reached maximum-medical improvement.

In November 2001, Dr. Capocelli testified that Harris was unable to return to work as a pole climber. Harris was seen by Dr. Capocelli in August 2002, and while return-to-work issues were not addressed, Dr. Capocelli recommended surgery for Harris. On April 22, 2004, Dr. Capocelli stated that Harris no longer needed surgery as he had reached maximum-medical improvement without it. It is noteworthy that while Dr. Capocelli issued an impairment rating, he did not return Harris to work. Instead, Dr. Capocelli recommended Harris have an FCE. At no time has Dr. Capocelli returned Harris to work.

Southern Telephone is correct that a 1999 FCE concluded that Harris could return to work at sedentary level. However, the Commission questioned the significance of the 1999 FCE because it was outdated, and Harris had received medical treatment since that time. Furthermore, Dr. Capocelli testified that these evaluations are somewhat subjective, and it is not unusual for a different evaluator during a second FCE to reach a different conclusion.

It is the Commission's duty to weigh the medical evidence and, if such evidence is conflicting, its resolution is a question of fact for the Commission. *Allen Canning Co. v. Woodruff*, 92 Ark. App. 237, ___ S.W.3d ___ (2005). The Commission's resolution of the medical evidence has the force and effect of a jury verdict. *Id.* Here, the Commission chose to place more weight on the testimony of Dr. Capocelli. In light of Dr. Capocelli's testimony, we must conclude that reasonable minds could have reached the same conclusions as the Commission. Therefore, we affirm the award of temporary total disability benefits.

Southern Telephone's final point on appeal is that substantial evidence does not support the Commission's decision to award Harris mileage for eight visits to Dr. Capocelli's office. At the hearing, medical evidence established that between May 17, 2003, and May 10, 2004, Harris was seen by Dr. Capocelli on three occasions. Harris testified that he traveled to Dr. Capocelli's office on four or five other occasions but was told upon his arrival that his appointment was cancelled.

Dr. Capocelli testified that in his practice surgical emergencies sometimes necessitate him leaving his office at the last minute causing cancellations. Dr. Capocelli further testified that Harris could have had up to fifteen appointments that were scheduled and cancelled during the relevant time period.

A claimant can be reimbursed for his mileage expenses related to medical treatment if the expenses are related to an injury arising out of and in the course of employment and the expenses meet all other reasonableness requirements established by the law, the Commission, and the courts. AWCC Advisory 89-2, *Revised*.

Substantial evidence supports the Commission's award of three of the visits because the facts are undisputed that between May 17, 2003, and May 10, 2004, Harris received treatment from Dr. Capocelli on three occasions. The evidence also established that Dr. Capocelli's treatment was reasonable and necessary treatment for Harris's work-related injury.¹ The primary issue raised by Southern Telephone is whether substantial evidence supports the Commission's award of mileage reimbursement for five additional trips to Dr. Capocelli's office for appointments that were cancelled. We hold that the testimony of Harris and Dr. Capocelli is substantial evidence supporting the award.

Affirmed.

MILLER and HEFFLEY, JJ., agree.

¹Southern Telephone offered no explanation as to why mileage was not paid to Harris for these three documented-medical visits.